

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ROBERT WILLIAM DUKE,

Defendant-Appellee.

UNPUBLISHED

April 24, 2007

No. 262325

Livingston Circuit Court

LC No. 04-014741-FH

ON REMAND

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

In an unpublished opinion issued September 28, 2006, Docket No. 262325, this Court remanded this matter to the trial court “for articulation in writing of the reasons for the downward departure from the sentencing guidelines,” because the record lacked the written articulation required by *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001).

The prosecutor’s motion for reconsideration in this Court was denied, but its application for leave to appeal to the Supreme Court resulted in an order reversing our prior order and remanding the matter to this Court “for consideration as on reconsideration granted of whether the Livingston Circuit Court erred in departing from the sentencing guidelines”¹ We reverse and remand for resentencing.

The basic facts are that defendant entered a trailer home at night, waking the trailer’s resident and the resident’s girlfriend. The resident yelled for defendant to leave, at which point defendant ran toward him and struck him in the face with his fist. According to the resident, defendant then ran from room to room in an apparent attempt to leave; when the resident opened the front door, defendant ran out. The resident’s girlfriend, meanwhile, had called 911. The police responding to the scene saw a person fitting defendant’s description run across the roadway a short distance away, and then found defendant lying on his back in a yard. When the police identified themselves, defendant again ran. The police caught defendant after a brief foot chase, and defendant struggled as the police attempted to place him in handcuffs.

¹ Docket No. 132641, issued February 27, 2007.

Test results indicated defendant's blood alcohol level was .14%. Defendant stated that he had attended a birthday party in a trailer in a trailer park that he was not familiar with. Defendant explained that he left the trailer briefly and walked some distance down the street, and although he blacked out and did not remember doing so, while attempting to return to the party, he entered the wrong trailer.

Defendant pleaded nolo contendere to first-degree home invasion, MCL 750.110a(2), aggravated assault, MCL 750.81a, consumption of alcohol by a minor, MCL 436.1703, and two counts of resisting or obstructing a police officer, MCL 750.81d(1). The prosecutor appealed the trial court's decision to depart downward from the recommended sentencing guidelines range for defendant's minimum sentence for home invasion. The trial court sentenced defendant to serve terms of four to twenty years in prison for home invasion; fifteen to twenty-four months in prison for resisting or obstructing; and one year in jail for aggravated assault, plus a fine for consumption by a minor.

The recommended minimum sentence range in this matter is eighty-four to one hundred forty months; the minimum the trial judge actually imposed, forty-eight months, was substantially below the low end of the recommended range.

The Sentencing Information Report (SIR) now included in the record for this matter articulates these reasons for the downward departure in sentencing:

Defendant's extreme intoxication with Defendant "blacking out."
Defendant's remorseful as stated in PSI.
Defendant's age.

A sentencing court may depart from the guidelines only for a "substantial and compelling reason" MCL 769.34(3); *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003). In our review of the reasons articulated by the trial court

the existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion. [*Babcock, supra* at 264-265.]

Here, defendant's claim that he blacked out and did not remember the break-in is, as a matter of law, not objective and verifiable.² Likewise, the trial court's assessment that defendant felt remorse is not objective and verifiable.³

Defendant's intoxication and age⁴ were objective and verifiable factors. However, to justify departure from the guidelines, a reason must "keenly . . . grab our attention," and must be "of considerable worth in deciding the length of a sentence." *Babcock, supra* at 257. The mere statement of age and intoxication as factors is insufficient to keenly grab our attention; without further explanation from the trial court as to why these factors are of considerable worth in deciding this defendant's sentence, we are unable to conclude that these reasons are substantial and compelling.

We find that two of the sentencing court's stated reasons for downward departure fail as a matter of law, and that the court did not provide sufficient explanation or detail to allow us to determine that the remaining two, age and intoxication, are substantial and compelling. We therefore remand for resentencing on defendant's first-degree home invasion conviction based on valid factors.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper

² To be considered objective and verifiable "the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

³ See *People v Daniel*, 462 Mich 1, 5-9; 609 NW2d 557 (2000).

⁴ The break-in occurred on November 14, 2004; defendant's date of birth is December 26, 1983.